Underground Service Alert of Southern California *and* Utility Workers Union of America, AFL–CIO and Local 599 of the Utility Workers Union of America, AFL–CIO. Cases 21–CA–28656 and 21–CA–28857

December 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On charges filed April 23, 1992, by Utility Workers Union of America, AFL–CIO (the Union), and Union Local 559 and on August 6, 1992, by the Union, the General Counsel of the National Labor Relations Board issued a consolidated complaint September 1, 1992, against Underground Service Alert of Southern California (the Respondent), alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, bypassing the Union by soliciting employees to work without union representation, and subsequently refusing to recognize the Union after it was certified as the exclusive representative of the unit. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On April 7, 1993, the General Counsel, the Respondent, and the Charging Parties filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties agreed that the charges, consolidated complaint, orders rescheduling and postponing hearing, and the stipulation of facts, including attached exhibits, shall constitute the entire record, and they waived a hearing before and decision by an administrative law judge. On September 24, 1993, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation with an office and place of business in Brea, California, has been engaged in the operation of communication facilities linking excavators to owners of underground lines. During the 12-month period ending August 31, 1992, the Respondent, in conducting its business operations, derived gross revenues in excess of $1 million and purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Following the Union's certification as the exclusive bargaining representative of the Respondent's data entry technicians on October 5, 1987,[1] the Respondent recognized the Union and entered into a collective-bargaining agreement with it effective August 1, 1988, through August 31, 1991. On June 28, 1991, unit employee Amy Bonds filed a decertification petition signed by 11 of the 26 unit members. Pursuant to the petition, an election was held in Case 21–RD–2424 on July 23, 1991. The tally of ballots showed 10 votes for and 8 against the Union, and 5 challenged ballots, a number sufficient to affect the results. The Regional Director subsequently issued a report recommending that four of the ballot challenges be overruled and that the challenge to the ballot of Robert Bettenhausen be sustained. The Union filed exceptions.

The Board issued a Decision, Direction, and Order on March 27, 1992,[2] adopting the Regional Director's recommendation to overrule four of the ballot challenges and directing the Regional Director to open and count those ballots. Finding, however, that the challenge to Bettenhausen's ballot raised substantial and material issues of fact which could be best resolved by a hearing, the Board ordered that a hearing be held on the challenge to his ballot if it remained determinative after the four other ballots were counted.

Pursuant to the Board's Order, a revised tally of ballots issued on April 6, revealing 11 votes for and 11 against the Union. Thus, Bettenhausen's challenged ballot remained determinative.

On April 14, the Respondent received a petition, signed by 14 of the 24 employees then in the unit, stating:

> We the employees of UNDERGROUND SERVICE ALERT OF SOUTHERN CALIFORNIA, withdraw recognition from UTILITY WORKERS UNION OF AMERICA, AFL–CIO, LOCAL 559. We elect to be represented by the Management of

[1] The bargaining unit, which the parties stipulated is appropriate, is as follows:

> All data entry technicians employed by the Employer at its facility located at 3030 Saturn Boulevard, Suite 200, Brea, California; excluding all other employees, managerial employees, professional employees, office clerical employees, confidential employees, administrative assistants, data entry technician supervisors, senior data entry technicians, guards and supervisors as defined in the Act.

[2] All dates hereinafter are in 1992, unless otherwise indicated.

> Underground Service Alert Of Southern California.

The Union made no allegation and the General Counsel's investigation of the unfair labor practice charges in this case reveals no evidence regarding any impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition.

On April 16, Respondent's president, Ronald Olitsky, sent a letter ''via hand-delivery'' to the Union and Local 559 informing them that the Respondent was withdrawing recognition of them as the collective-bargaining representative of the unit. On the same date, Olitsky and Respondent's manager, Don Evans, issued a memorandum to all of the Respondent's employees, stating in part as follows:

> We want to share with you a copy of the letter we have sent today to the Union. This letter withdraws recognition from the Union and terminates our relationship with the Union.
>
> Therefore, we are pleased to announce that the Company now considers itself once again free to work directly with its employees, without the Union being involved in our employment relationships.

The memorandum also stated that the hearing on whether Bettenhausen's ballot should be counted had been postponed until May 1 at the Union's request and that the Respondent regarded the hearing as moot in light of its withdrawal of recognition from the Union.

Following the May 7 hearing on Bettenhausen's ballot, the hearing officer issued a report on May 29 recommending that the challenge to Bettenhausen's ballot be overruled. No exceptions were filed to the hearing officer's report. On June 23, the Board adopted the report and ordered that Bettenhausen's ballot be opened and counted. On July 1, a second revised tally of ballots issued, showing 12 votes for and 11 against the Union. On July 10, the Acting Regional Director for Region 21 issued a Certification of Representative, certifying the Union as the exclusive bargaining representative for the unit.

On July 23, the Union requested that the Respondent recognize and bargain with it as the exclusive bargaining representative of the unit. On July 31, the Respondent declined to recognize the Union as the unit's bargaining representative based on the Respondent's April 16 withdrawal of recognition. The Respondent has continued to refuse to recognize the Union as the representative of the unit since April 16.

B. *The Parties' Contentions*

The General Counsel, contending that the Respondent unlawfully withdrew recognition of the Union and thereafter refused to recognize and bargain with it, argues that elections conducted by the Board are the preferred method of determining employees' representational wishes and serve as a more reliable and objective indicator of employee views than do petitions. The General Counsel notes that because a union enters a decertification election as the presumptive representative of the unit employees and this presumption is not rebutted by an election that is contested, the Board in *W. A. Krueger Co.*, 299 NLRB 914 (1990), held that ''an incumbent union is entitled to be treated as the employees' bargaining representative until a final determination is made that the union is no longer the employees' representative.''[3] Thus, the General Counsel contends, once the election took place, the Respondent was precluded from withdrawing recognition on the basis of an employee petition during the period before the election results were certified, as the employees' wishes had already been indicated by the ballots they cast.

The General Counsel asserts that *Atwood & Morrill Co.*, 289 NLRB 794 (1988), is not to the contrary. In that case an employer's withdrawal of recognition based on written statements from a majority of employees that they no longer desired union representation was held not to violate Section 8(a)(5), even though the withdrawal occurred after a decertification petition had been filed. The General Counsel notes that in *Atwood & Morrill* the decertification petition was held in abeyance and no election had been conducted.

The General Counsel further argues that, if the certification in the present case had issued immediately after the election, the Union would have received a 1-year irrebuttable presumption of majority status, which would have precluded the Respondent's withdrawal of recognition. The General Counsel maintains that employers should not be given an incentive to challenge ballots in order to delay issuance of the certification in the hope that employees will become disillusioned and petition the employer to withdraw recognition.

The General Counsel also contends that the Respondent engaged in unlawful direct dealing with the employees through its April 16 memorandum notifying them that it was now free to work directly with them without the Union being involved. This communication, according to the General Counsel, attempted to erode the Union's position as the exclusive bargaining representative of the unit. The General Counsel contends that, because the Respondent was not privileged to withdraw recognition from the Union on April 16, it was prohibited from soliciting direct dealing with the unit employees.

The Respondent contends that *Atwood & Morrill* governs the present case. According to the Respondent, the fact that here the withdrawal of recognition occurred at a different stage in the decertification proc-

[3] 299 NLRB at 916.

ess—after the election balloting—is a distinction without a difference because in both cases the withdrawal occurred before the Board made any official determination regarding the results of the decertification petition. The Respondent urges that the concept of continued majority status should be viewed as if it were a live telephone connection that must be maintained continuously. If the circuit is interrupted at any point, the line goes dead, and an employer is privileged to ''hang up'' by withdrawing recognition. The Respondent further contends that its April 16 withdrawal of recognition mooted the election process, so the Regional Director should neither have conducted the May 7 hearing on Bettenhausen's challenged ballot nor issued the subsequent Certification of Representative. Noting that it challenged only one ballot, the Respondent denies that it sought to drag its feet by challenging election ballots and using the ensuing delay to engender employee disaffection from the Union.

C. *Discussion*

1. We agree with the General Counsel that the Respondent's April 16 withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. The principle has long been established that ''a secret-ballot Board-conducted election is the preferred method of ascertaining employee choice.'' See, e.g., *EMR Photoelectric*, 273 NLRB 256, 257 (1984), citing *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969). Consequently, as the court of appeals observed in *NLRB v. Cornerstone Builders*, 963 F.2d 1075, 1078 (8th Cir. 1992), ''unilateral withdrawal of union recognition is generally a poor substitute for an election proceeding.'' The court explained:

> Election proceedings provide an objective basis for withdrawals of union recognition. In contrast, unilateral withdrawal is based on the subjective belief of an inherently biased party. Second, election proceedings validate withdrawal as it occurs. Unilateral withdrawal, on the other hand, can only be validated after the fact in a subsequent election proceeding or court proceeding (such as the present case). Until validation, the effectiveness of the unilateral derecognition is uncertain. Finally, election proceedings provide general notice to all interested parties that a change in union recognition has occurred. Unilateral withdrawal provides no such general notice.[4]

In his separate opinion, concurring in part and dissenting in part, in *W. A. Krueger Co*., 299 NLRB 914 (1990), former Member Oviatt similarly observed:

> In the election situation, the union and employer know that the union's representative status is in question and are alert to interference with employee free choice. In contrast, where an employer is presented with an employee petition and withdraws recognition, neither the union nor the employer has necessarily had occasion to be watchful for obstacles to free choice. The election, typically, also is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.[5]

Such considerations led the court of appeals in *NLRB v. Tahoe Nugget, Inc*., 584 F.2d 293 (9th Cir. 1978), to conclude:

> When the employer chooses to unilaterally disrupt an established bargaining relationship without an election, the threat to industrial peace must be counterbalanced by good cause. When the employer has doubts, the goal of the Act would be better served by filing an election petition.[6]

Thus, it is widely recognized that Board-conducted elections can better effectuate the promotion of industrial peace than unilateral employer withdrawals of recognition based on evidence of a union loss of majority support presented directly to employers because, among other factors, Board-conducted elections are a more reliable indicator of employee wishes.

One of the attributes of Board-conducted elections that make them a more reliable indicator of employee choice is that they provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted. One result of the availability of this process, however, is that in a small minority of elections, such as the present one, a substantial delay may, unfortunately, occur before the outcome of the election is determined. Nevertheless, as the court of appeals in *Tahoe Nugget* declared in weighing decertification elections against unilateral

[4] 963 F.2d at 1078.

[5] 299 NLRB No. 141, slip op. at 23. A line was inadvertently omitted from the above-quoted passage in the Board bound volume. See 299 NLRB at 921. The Board's slip opinion accurately set forth the above-quoted passage.

The partial dissent would have applied to decertification elections the ''at-your-peril'' rule governing changes during the period between balloting and certification in *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974). See discussion below.

[6] 584 F.2d at 301–302 (footnotes omitted).

withdrawals of recognition, ''Although we recognize that an election petition may cause delay and create other practical problems, the election process is still preferable.''[7]

Because some delay between an election and the determination of its outcome inevitably arises from the very process that makes Board-conducted elections the preferred method for ascertaining employee choice, it would be incongruous indeed if, during the interval between the holding of the election and, as here, the certification of the Union as bargaining representative, an employer were permitted to withdraw recognition on the basis of some other, less-preferred indicator of employee sentiment, such as an employee petition. Allowing withdrawals of recognition in these circumstances would undermine the election process itself, as it would honor the employer's unilateral interpretation of an expression of employee sentiment without regard to the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method—the Board-conducted secret-ballot election ultimately won by the Union.

Based on the above, we believe that the Respondent violated Section 8(a)(5) and (1) when it withdrew recognition during the pendency of a review of an election that ultimately resulted in the certification of the Union.[8]

2. Having found that the Respondent's April 16 withdrawal of recognition was unlawful, we additionally conclude, as urged by the General Counsel, that the Respondent's memorandum to its employees on that date stating that it was free to work directly with the employees without involvement of the Union bypassed the Union and constituted solicitation of direct dealing with the employees in violation of Section 8(a)(5) and (1). Cf. *Harris-Teeter Super Markets*, 310 NLRB 216 (1993).

3. We further conclude that the Respondent's refusal to recognize and bargain with the Union after the Union requested it to do so on July 23, following the July 10 certification of the Union as the employees' exclusive bargaining representative, violated Section 8(a)(5) and (1). On certification, a union enjoys an irrebuttable presumption of majority support for 1 year. ''During that time, an employer's refusal to bargain with the union is *per se* an unfair labor practice under Section 8(a)(1) and (5).'' *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 778 (1990). For this reason, and in view of our discussion above concerning the preferability of Board-conducted elections for ascertaining employee representational desires, we find wholly without merit the Respondent's contention that its prior withdrawal of recognition of the Union based on an employee petition takes precedence over the Board's subsequent certification of the Union based on the outcome of a Board-conducted election. See *Brooks v. NLRB*, 348 U.S. 96 (1954) (employer's refusal to bargain with recently certified union based on postelection employee petition received by employer prior to union's certification violated Section 8(a)(5) and (1)).

CONCLUSION OF LAW

By withdrawing recognition of the Union as the exclusive bargaining representative of the unit on April 16, 1992, by bypassing the Union and soliciting employees in its April 16, 1992 memorandum to work directly with the Respondent without involvement of the Union, and by its July 31, 1992 letter failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit, the Respondent has engaged in unfair labor practices affecting commerce with the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Underground Service Alert of Southern California, Brea, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of Utility Workers Union of America, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate unit:

> All data entry technicians employed by the Employer at its facility located at 3030 Saturn Boulevard, Suite 200, Brea, California; excluding all other employees, managerial employees, professional employees, office clerical employees, confidential employees, administrative assistants, data entry technician supervisors, senior data entry

[7] Id. at 302 fn. 32.

[8] *Atwood & Morrill Co.*, 289 NLRB 794 (1988), is distinguishable because in that case there was no election process underway when a majority of the unit employees presented their petition to the employer stating that they did not want to be represented by the union.

Members Stephens and Cohen do not pass on the validity of *W. A. Krueger*, 299 NLRB 914 (1990). In that case, the union was ultimately declared the loser of the election. In the instant case, the union was ultimately declared the winner.

Member Devaney adheres to *W. A. Krueger*, which he notes continues to be prevailing Board precedent. Accordingly, in Member Devaney's view, the Respondent's withdrawal of recognition of the Union, at a time when an election had been conducted and its outcome not yet determined, violated Sec. 8(a)(5) without regard to whether the Union ultimately won the election.

technicians, guards and supervisors as defined in the Act.

(b) Bypassing the Union and soliciting employees to work directly with the Respondent without involvement of the Union.

(c) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its Brea, California facility copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of Utility Workers Union of America, AFL–CIO as the exclusive bargaining representative of our employees in the following bargaining unit:

> All data entry technicians employed by the Employer at its facility located at 3030 Saturn Boulevard, Suite 200, Brea, California; excluding all other employees, managerial employees, professional employees, office clerical employees, confidential employees, administrative assistants, data entry technician supervisors, senior data entry technicians, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union and solicit you to work directly with us without involvement of the Union.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive bargaining representative of our employees in the above-described bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining unit.

UNDERGROUND SERVICE ALERT OF SOUTHERN CALIFORNIA